

## ARMED SERVICES BOARD OF CONTRACT APPEALS

Application Under the Equal Access )  
to Justice Act -- )  
 )  
Mediatrix Interactive Technologies, Inc. ) ASBCA Nos. 43961, 46408, 50054  
 )  
Under Contract No. HEW-105-77-1006 )

APPEARANCE FOR THE APPELLANT: J. Michael Slocum, Esq.  
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Washington, DC

### OPINION BY ADMINISTRATIVE JUDGE YOUNGER

#### BACKGROUND

This is an application under the Equal Access to Justice Act (EAJA), 5 U.S.C. § 504, for payment of attorney fees and costs relating to our decision in *Mediatrix Interactive Technologies, Inc.*, ASBCA Nos. 43961, 46408, 50054, 99-1 BCA ¶ 30,318, *aff'd on reconsider.*, 99-2 BCA ¶ 30,453. In that decision, we concluded that appellant was entitled to recover 5.323 percent of the amount of its net claim, and that respondent was not entitled to recover on its claim. Both claims related to the termination for convenience of appellant's cost-plus-fixed-fee contract to study the Head Start program.

Appellant's net claim aggregated \$1,716,103, plus interest. It was divided into five major cost categories, containing 24 separate subcategories of claimed costs. The two categories that are relevant here were denominated as Mailgram costs and settlement costs. We concluded that appellant was entitled to recover \$16,582 of the \$29,420 in claimed Mailgram costs, which related to work that appellant had performed at respondent's request following the termination. Of the \$16,582 awarded, \$12,632 was uncontested by respondent as a result of documentation finally produced by appellant. *Mediatrix, supra*, 99-1 BCA at 149,915, 149,920-21 (findings 43, 79, 88, 93, 94, 135). We also concluded that appellant was entitled to recover \$74,761 of the \$358,469 in claimed settlement costs, which related to post-termination efforts to resolve the claim. Respondent challenged the entire amount. *Id.* at 149,915, 149,924-25 (findings 43, 123, 126, 128, 130, 132). The

sum of the \$16,582 in Mailgram costs and the \$74,761 in settlement costs yielded appellant's entitlement to \$91,343, plus interest. *Id.* at 149,925 (finding 135), 149,931.

Respondent's affirmative claim aggregated \$741,653. It was said to represent the difference between the total amount that it paid appellant during performance, and the sum of allowable costs. We concluded that, beyond defending against appellant's claim, respondent had not adduced specific evidence to establish its entitlement to the affirmative recovery sought, and hence we denied the claim. *Id.* at 149,915 (finding 44), 149,931.

In its application, appellant seeks \$48,232.25 in attorney and paralegal fees, together with \$2,650.35 in costs, for a total of \$50,882.60. The supporting invoices are for services during the period from 7 October 1987, which is subsequent to the contracting officer's purported decision the previous July, and 20 May 1999, which follows appellant's motion for reconsideration of our decision. The attorney and paralegal time billed in the invoices is not apportioned according to time spent on Mailgram and settlement issues, on the one hand, and on other issues (including respondent's claim), on the other hand. To establish eligibility, appellant presents an unsworn net worth statement showing total assets of \$132,428 and total liabilities of \$639,428.66, for a negative net worth of \$507,000.66. There is no showing in the application regarding the number of appellant's employees when the appeal was filed.

## DECISION

### Eligibility

Under the Act, a corporate applicant must establish that its "net worth . . . did not exceed \$7,000,000 at the time the [appeals were] initiated, and [that it] had not more than 500 employees at the time the [appeals were] initiated . . . ." 5 U.S.C. § 504(b)(1)(B). Inasmuch as respondent has interposed no objection to the net worth statement, we accept it. In addition, while the application contains no employee showing, we found in our decision that appellant was not an ongoing business before filing ASBCA No. 43961 and during conduct of the 1996 audit. *Mediatrix, supra*, 99-1 BCA at 149,912 (finding 26), 149,914 (finding 40). Accordingly, appellant has established eligibility.

### Prevailing Party

Under the Act, an applicant must be a "prevailing party." 5 U.S.C. § 504(a)(1). An applicant meets this requirement if it achieved some of the benefit that it sought in the litigation. *Texas State Teachers Association v. Garland Independent School District*, 489 U.S. 782, 791-92 (1989) (interpreting 42 U.S.C. § 1988). "It is not necessary to succeed on every issue to meet the criterion of 'prevailing party' as contemplated by the EAJA," *Naekel v. Department of Transportation*, 884 F.2d 1378, 1379 (Fed. Cir. 1989), and we have held that contractors met the requirement where they succeeded on fractional

portions of their appeals. *E.g.*, *Aislamientos y Construcciones Apache S.A.*, ASBCA No. 45437, 98-1 BCA ¶ 29,373 at 146,008 (contractor succeeded on 3.478 percent of amount claimed); *Jackson Engineering Co., Inc.*, ASBCA No. 36220, 91-3 BCA ¶ 24,178 at 120,934 (contractor succeeded on 8.8 percent of amount claimed). As indicated, appellant prevailed on 5.323 percent of its claim and defeated the Government's claim. Accordingly, to that extent, it qualifies as a prevailing party.

### Substantial Justification

Under the Act, respondent may avoid liability if it can establish that its position was "substantially justified." 5 U.S.C. § 504(a)(1). It must do so with respect to both these appeals and the underlying governmental action or inaction. 5 U.S.C. § 504(b)(1)(E). Under the familiar standard, respondent's position is substantially justified if it is "justified in substance or in the main" or "if a reasonable person could think it correct, that is, if it has a reasonable basis in law and fact." *Pierce v. Underwood*, 487 U.S. 552, 565, 566 n. 2 (1988).

Respondent stresses the similarities between *Aislamientos* and this record. There, we held that respondent's position was substantially justified because a preceeding investigation concluded "that the claim included numerous discrepancies. Those discrepancies were evident in the case presented to the Board, and . . . were so pervasive as to justify the position of the Government in denying the claim in total." *Aislamientos, supra*, 98-1 BCA at 146,008. We relied on "several findings [in the opinion on the merits] which cast doubt on the veracity of the appellant and the claims it pursued," as well as unpersuasive explanations by appellant's president and "the lack of credible supporting documentation" for certain payments. *Id.* We said:

When we consider the utter lack of credibility with respect to two large portions of the claim and appellant's refusal to retain critical documentation that would have supported the claim, it becomes evident that substantial doubt existed regarding the veracity of the claim as a whole. It was, therefore, reasonable for the Government to hold the entire claim suspect and thus, denial of the claim in total was substantially justified. . . .

*Id.* at 146,009.

We follow *Aislamientos*. In these appeals relating to a cost-type contract, the pervasive issue, both before the contracting officer and at trial, "relate[d] to the adequacy of appellant's proof of its claimed costs." *Mediatrix, supra*, 99-1 BCA at 149,926. Respondent audited appellant's records twice, in 1986 and again in 1996, employing two different teams

of auditors. Each time, the auditors had encountered fundamental problems with substantiation. *Id.* at 149,912 (finding 28), 149,913-14 (findings 35, 38, 41).

The substantiation problem was acute with respect to the majority of the indirect costs. Over 70 percent of the indirect costs were billed to appellant by BusinessServe, a company also wholly owned by appellant's president and hence under common control. While FPR 1-15.205-22(e) required that "[a]llowance for all materials, supplies and services which are sold or transferred between any division, subsidiary, or affiliate of the contractor under a common control shall be on the basis of cost incurred," BusinessServe's own records contained no audit trail by which the auditors could trace its costs. *E.g.*, *Mediatrix, supra*, 99-1 BCA at 149,909 (finding 6), 149,910 (finding 11), 149,912 (finding 28), 149,914 (finding 41), 149,918 (findings 63-65). After trial, we concluded that the BusinessServe billings were unreliable for comparable reasons. *E.g.*, *id.* at 149,928-29.

In addition, when they turned to appellant's other records under this cost-type contract, the auditors encountered a wholesale "lack of credible documentation." *Aislamientos, supra*, 98-1 BCA at 146,008. That is, the auditors could not conclude that appellant's computerized All Account Activity Report, its core document for cost accumulation, and its similar All Vendor Activity Report, were "sufficient to reflect properly" the claimed costs, as required by the Accounts, Audits and Records clause. *Mediatrix, supra*, 99-1 BCA at 149,927. Transactional testing on appellant's accounting system from those reports yielded minimal supporting documentation of actual costs. *See id.* at 149,917-18 (findings 59-62), 149,919 (findings 70-71). Apart from the sampled transactions, appellant failed to produce source documentation for other expense items appearing in the reports. *E.g.*, *id.* at 149,913-14 (finding 38), 149,915 (findings 46-48). This lack of documentation reasonably cast doubt on incurrence of the claimed costs, and other findings of the auditors question allowability, reasonableness and allocability. *E.g.*, *id.* at 149,917 (finding 58), 149,920-22 (findings 83, 86, 91, 102, 105). After trial, we found the auditors to be credible witnesses, and their conclusions to be well documented. *Id.* at 149,913 (findings 35, 36), 149,926-27.

It is true that appellant was the prevailing party on a small part of the appeals. Nonetheless, as the claim on this cost-type contract stood before the contracting officer, it was characterized by such a pervasive lack of documentation that denial in the entirety was "justified in substance or in the main." *Pierce, supra*, 487 U.S. at 565. For the same reason, respondent's defense of the contracting officer's decision in these appeals was also substantially justified.

#### CONCLUSION

The application is denied.

Dated: 28 December 2000

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ALEXANDER YOUNGER  
Administrative Judge  
Armed Services Board  
of Contract Appeals

I concur

I concur

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MARK N. STEMLER  
Administrative Judge  
Acting Chairman  
Armed Services Board  
of Contract Appeals

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CARROLL C. DICUS, JR.  
Administrative Judge  
Acting Vice Chairman  
Armed Services Board  
of Contract Appeals

I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals on an application for fees and other expenses incurred in connection with ASBCA Nos. 43961, 46408, 50054, Appeals of Mediac Interactive Technologies, Inc., rendered in accordance with 5 U.S.C. § 504.

Dated:

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EDWARD S. ADAMKEWICZ  
Recorder, Armed Services  
Board of Contract Appeals